

3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169-5996
Facsimile (702) 949-8321
Telephone (702) 949-8320

Robert M. Charles, Jr. NV State Bar No. 006593
Email: rcharles@lrlaw.com
John Hinderaker AZ State Bar No. 018024
Email: jhinderaker@lrlaw.com
Marvin Ruth NV State Bar No. 10979
Email: mruth@lrlaw.com

Attorneys for USACM Liquidating Trust

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

USA Commercial Mortgage Company,

Debtor.

Case No. BK-S-06-10725-LBR
Chapter 11

**Declaration Of Geoffrey Berman In
Support Of Omnibus Objections Of
USACM Trust To Proofs Of Claim
Based Upon USACM Pension Plan**

October 18, 2011

Hearing Time: 1:30 p.m.

Estimated Time for Hearing: 10 minutes

I, Geoffrey L. Berman, declare under penalty of perjury:

1. I am an adult person competent to testify in court.

2. I make this declaration based upon my personal knowledge, and upon the records USA Commercial Mortgage Company.

3. I am the Trustee of the USACM Liquidating Trust ("USACM Trust"), which is an entity created by the Debtors' Third Amended Joint Chapter 11 Plan of Reorganization ("Plan"), in the jointly-administered bankruptcy cases, *In re USA Commercial Mortgage Company*, BK-S-06-10725-LBR, pending in the United States Bankruptcy Court for the District of Nevada.

4. **Pension Plan.** USACM adopted the USA Commercial Mortgage Company Defined Benefit Pension Plan ("Pension Plan") effective as of January 1, 1998. All new

1 benefit accruals under the Pension Plan were discontinued and accrued benefits frozen
2 effective as of September 30, 2006.

3 5. On January 15, 2007, the Pension Plan was involuntarily terminated by the
4 PBGC. On January 26, 2007, the PBGC became the statutory trustee of the Pension Plan
5 pursuant to an agreement between the PBGC and USACM.

6 6. USACM was the “contributing sponsor,” as defined in 29 U.S.C.
7 § 1301(a)(14), of the Pension Plan. Debtors USA Investment Partners, LLC, USA Capital
8 Realty Advisers, LLC and other Debtors are also alleged by the PBGC to be a member of
9 the “controlled group” for the Pension Plan and are jointly and severally liable for any
10 obligations to the Pension Plan. See 29 U.S.C. §§ 1301(a)(14), (e)(2).

11 7. Approximately 30 former employees of USACM were participants in the
12 Pension Plan. The participants with the largest stake in the Pension Plan include Thomas
13 Hantges, Joseph Milanowski, Paul Hamilton and Victoria Loob (collectively, the “Insider
14 Beneficiaries”), who were officers and/or owners of the Debtors prior to the Petition Date.
15 The Trust has the right to assert claims against the Insider Beneficiaries and other pre-
16 petition employees of the Debtors pursuant to the terms of the Plan for their breach of
17 fiduciary duties, misappropriation of corporate opportunities, conversion, state and federal
18 RICO, fraudulent transfer and other alleged wrongful conduct prior to the Petition Date.

19 8. **The PBGC Claims.** On November 9, 2006, the PBGC filed Claim Nos.
20 791, 793 and 794 against USACM’s estate (collectively, the “Original Claims”). On
21 March 2, 2007, USACM filed an objection to the Original Claims.

22 9. On April 23, 2007, the PBGC filed amended Claim No. 791 in an estimated
23 amount of \$120,870, consisting of an administrative claim in the amount of \$112,572 and
24 an unsecured claim in the amount of \$8,298. Other than \$72 in other charges, the
25 administrative claim portion of Claim No. 791 consists of a penalty charged by the PBGC
26 pursuant to 29 U.S.C. § 1306(a)(7) upon termination of the Pension Plan in January 2007.

1 10. On April 23, 2007, the PBGC also filed amended Claim No. 793, an
2 administrative claim in an estimated amount of \$1,211,242.

3 11. On April 25, 2007, the PBGC filed amended Claim No. 794, an unsecured,
4 non-priority claim in an estimated amount of \$1,700,624. Amended Claim No. 794 also
5 reserved the right to seek administrative or priority tax treatment for the claim.

6 12. **The Objections and PBGC Settlement.** The Trust objected to the PBGC
7 Claims. After briefing, argument, and extensive negotiations between the Trust and the
8 PBGC, the Trust and the PBGC reached a settlement of the PBGC's claims. The Court
9 was required to and did resolve one legal issue as to the alleged administrative priority of
10 the PBGC claims.

11 13. **The Pension Claims.** Exhibit A, attached, lists Proofs of Claim filed by
12 former USACM insiders and employees that appear to be based upon the USACM
13 Pension Plan.

14 14. The claimants are Tom Hantges, Victoria Loob, Stephen Hefner, Douglas
15 Esteves, and Devin Lee. Exhibit A identifies the Proof of Claim number, the claimant, the
16 claimant's address, the total amount of the claim and the total amount of the claim based
17 upon the information provided by the claimant. The claims listed in Exhibit A are referred
18 to hereafter as the "Pension Claims."

19 15. **The Plan And Subordination.** Claims of insiders against USACM were
20 defined as "Subordinated Claims" in the Plan, classified in Class A-7, and subordinated to
21 the payment of general unsecured claims. E.g. Debtors' Third Amended Joint Chapter 11
22 Plan Of Reorganization [DE 1799] at 34.

23 16. Based upon their status as officers, directors, or persons in control of
24 USAM, I believe that Tom Hantges and Victoria Loob were insiders of USACM and thus
25 their claims are Subordinated Claims under the Plan.
26

LEWIS
AND
ROCA
LLP
LAWYERS

Copy of the foregoing and pertinent
portion of Exhibits mailed by first
class postage prepaid U.S. Mail on
September 16, 2011 to all parties listed
on **Exhibit A** attached.

LEWIS AND ROCA LLP

/s/ Renee L. Creswell
Renee L. Creswell